

In the matter of the Appeal by

BOARD DECISION

PSC NO. 97-02

December 2, 1997

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; and Richard Carpenter, Member

In accordance with Public Contract Code § 10337, the review of the Agreement was delegated to the Executive Officer of the Board. By letter dated July 24, 1997, the Executive Officer set forth his decision that the Agreement was not a "personal services

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contract" subject to review by the Board. CSEA appealed the Executive Officer's decision to the Board.

In this decision, the Board rejects the Executive Officer's decision and finds that: (1) the Agreement is a "personal services contract" as that term is defined in California Code of Regulations, Title 2, § 279.1 and (2) the Agreement is not justified under Government Code § 19130(b)(4).

BACKGROUND

In 1953, DOT began to acquire properties for proposed Route 710 in the cities of Pasadena and South Pasadena. DOT currently owns approximately 463 of these properties. Until such time as construction of Route 710 actually commences, DOT leases these properties to members of the public pursuant to Streets & Highways Code § 104.6.

These properties are currently managed by civil service staff under DOT's Right-of-Way program. As part of their functions, DOT's civil service employees place advertisements notifying the public that the properties are available for rent, collect and record rents on a regular basis, execute and enforce rental agreements, order repairs to be made when needed and perform all other duties required of DOT under the rental agreements with the tenants.

On October 1, 1996, DOT issued a Request for Proposal (the "RFP") in an effort to "select the best qualified Bidder who will provide the best management plan and the highest monthly payment to the State" in regard to 50 of the approximately 463 properties. (All of these 50 designated properties are single family homes.) The RFP

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requires that the successful bidder be a licensed real estate broker. In accordance with the RFP, the successful bidder will enter into the Agreement. Under the Agreement, the successful bidder will be designated as the "Master Tenant" who will collect rents from the tenants of the 50 designated properties and provide management, maintenance and repair services. The proposed Agreement provides that the successful bidder must also provide a "designated manager" to "assist tenants with routine problems, such as collection of rents, rental deposits, dealing with contractors and subcontractors, etc." Pursuant to the Agreement, all of DOT's rights and obligations under the existing tenant rental agreements for the 50 designated properties will be assigned to the successful bidder.

DISCUSSION

THE AGREEMENT IS A PERSONAL SERVICES CONTRACT.

Under Government Code §19132, the Board is required to review "the adequacy of any proposed or executed contract which is of a type enumerated in Subdivision (b) of Section 19130." Government Code § 19130 begins with the provision that "[t]he purpose of this article is to establish standards for the use of personal services contracts." Subdivision (b) of Section 19130 begins: "[p]ersonal service contracting also shall be permissible when any of the following conditions can be met." Thus, in order for a contract to be subject to Board review under Government Code § 19130(b), it must be a "personal services contract."

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There is no definition of "personal services contract" in the Government Code. Instead, the definition of "personal services contract" is set forth in California Code of Regulations, Title 2, § 279.1. Section 279.1 provides in relevant part:

A "Personal Services Contract" is defined as any contract, requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element. The business or person performing these contractual services must be an independent contractor and does not have status as an employee of the State.

The Board finds that the Agreement is a "personal services contract" because the personal services to be provided thereunder are both "significant" and "separately identifiable" elements of the Agreement.

The services are a significant part of the Agreement. As the RFP states, the DOT's purpose in proposing to enter into the Agreement is to obtain the best qualified bidder to manage the 50 designated properties. Unlike a true lease which transfers to a tenant the right to occupy or use real property, the Agreement merely authorizes the successful bidder to "manage and maintain" the 50 designated properties.¹ The Board agrees with CSEA's contention that the management, maintenance and repair services provided for in the Agreement are not merely significant parts of the Agreement; they are the very essence of the Agreement. If the successful bidder did not perform these services, there would be no other reason for either it or DOT to enter into the Agreement.

¹ DOT claims that the Agreement is a true lease since the successful bidder will be paying rent. However, a review of the Declaration of Richard Golub, Assistant Program Manager for the Right of Way Program, submitted by DOT makes clear that the "rent" the successful bidder will be paying will not be calculated based upon the fair rental value of the properties, but, instead, will be calculated by deducting from the rent the 50 tenants of the properties currently pay the average maintenance and repair costs and adjusting for management costs and vacancy and delinquency factors.

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The services are separately identifiable elements of the Agreement.

The Agreement clearly spells out the management, maintenance and repair services the successful bidder must perform. The services are, therefore, separately identifiable.

THE AGREEMENT IS NOT JUSTIFIED UNDER GOVERNMENT CODE § 19130(b)(4).

Government Code § 19130(b)(4) permits state agencies to enter into personal services contracts when the following conditions are met:

The services are incidental to a contract for the purchase or lease of real or personal property. Contracts under this criterion, known as "service agreements," shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

As set forth above, the management, maintenance and repair services to be provided under the Agreement are not incidental to the Agreement; they are the very essence of the Agreement. As such, the Agreement does not qualify as a "service agreement" as described in Section 19130(b)(4).

CONCLUSION

For the foregoing reasons, the Board disapproves the Agreement.

STATE PERSONNEL BOARD*

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member

*Members Stoner and Alvarado were not present when this matter was heard before the Board, and therefore did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on December 2, 1997.

Walter Vaughn
Acting Executive Officer
State Personnel Board